83-478

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM W. SHAFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Question Presented.

Whether a prosecutor's intentional withholding of evidence which casts serious doubt on the credibility of his principal grand jury witness is prosecutorial misconduct of the sort which requires the dismissal of the subsequent indictment.

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WILLIAM W. SHAFFER,

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vs.

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Respondent.[1]

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner William W. Shaffer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on June 3, 1983 and modified on July 28, 1983.

Opinion Below.

The unpublished opinion of the Court of Appeals and the order amending it appear in the Appendix to this petition. No opinion was rendered by the District Court for the Central District of California.

[1]The caption contains the names of all parties other than a co-defendant who was acquitted.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 3, 1983 and was amended on July 28, 1983. A timely petition for rehearing *en banc* was denied on August 11, 1983, and this petition was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved.

Amendment V to the United States Constitution provides that

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law. . . .

Statement of the Case.

The government's principal witness before the grand jury which indicated petitioner was Robert Durand. Durand testified that he was involved in cocaine trafficking, described his importation of cocaine and testified that petitioner was one of his co-conspirators. His testimony formed the basis for the indictment of William Shaffer.

In addition to his testimony regarding drug trafficking, Durand offered the grand jury an explanation for his cooperation: Durand testified that he was cooperating with the government because he had a feeling of moral responsibility (CR 93 at 3[2]). However, according to a statement of Durand provided to the defense, there were other, more compelling, reasons for Durand's testimony. He cooperated because he feared that the wife of the pilot who was involved in the

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[2] "CR" refers to the Clerk's Record; "RT" refers to the Reporter's Transcript on appeal.

drug trafficking was about to talk to the government or had already done so (CR 93 at 4). He had been threatend by his own wife, who said that she would talk to the government about his drug smuggling, apparently in an attempt to obtain a favorable divorce settlement (*Id.*). Finally, Durand knew that the government was aware of his involvement and might be preparing to indict him. None of these factors were brought to the attention of the grand jurors.

Upon discovering that the true reasons for Durand's grand jury testimony were other than his self-professed ones, petitioner moved to dismiss the indictment (CR 93, RT 184, 212). The motion to dismiss was denied on the ground that the record did not disclose the suppression of evidence casting serious doubt on the credibility of Durand. See *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979). Durand's credibility, said the trial court, could be tested by defense counsel on cross-examination (RT 247).

REASONS FOR GRANTING THE WRIT.

The prosecutor's intentional withholding of evidence casting serious doubt on the credibility of Durand deprived the grand jury of the opportunity to judge his credibility, usurped its constitutional function, and was improper. It was prosecutorial misconduct of the sort which requires the dismissal of subsequent indictment.

Prosecutions of "infamous" [felony] crimes in the federal courts are required to be initiated by indictment returned by a grand jury. Fifth Amendment, United States Constitution. This constitutional guarantee *presupposes* that the grand jury operates as an investigative body "acting independently of either prosecuting attorney or judge" [*Stirone v. United States*, 361 U.S. 212, 218 (1960)] "whose mission is to clear the innocent no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). "Historically [the Grand Jury] has been regarded as the primary security to the innocent against hasty, malicious and oppressive prosecutions; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether the charge is founded upon reason or was dictated by an intimidating power or by malice, or ill-will." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). It is also recognized that this "buffer" is to be "independent and informed." *Wood v. Georgia, supra.*

The cost to society of a grand jury that is not an independent and informed one is great:

> " 'Though the indictment of the grand jury is no more than an accusation bearing no evidentiary value at trial and does not in any way change the presumption of defendant's innocence, there can be no doubt that an indictment by a grand jury places on a defendant the heavy burdens of expending time, energy and capital in the defense of his case and almost certainly of

> meeting the social opprobrium that shadows him while under the charge of the indictment. In addition, trial of charges brought without a sufficiently solid basis is wasteful of the court's time and an improper abuse of public funds." *United States v. Provenzano*, 440 F.Supp. 561, 566 (S.D.N.Y. 1977), quoting from *United States v. Fillippatos*, 307 F.Supp. 564, 565 (S.D.N.Y. 1969).

The federal courts have become increasingly aware of the defects in the grand jury system and of the ability of the prosecution to achieve almost any desired result before the grand jury. Because of this, some courts have required that grand jury proceedings be conducted under certain general guidelines. See *United States v. Al Mudarris*, 695 F.2d 1182 (9th Cir. 1983); *United States v. Samango*, 607 F.2d 877, 844 (9th Cir. 1979); *United States v. Guilette*, 547 F.2d 743, 752, 753 (2d Cir. 1976); *United States v. Basurto*, 497 F.2d 782, 785, 786 (9th Cir. 1974); *United States v. Sears Roebuck & Co., Inc.*, 517 F.Supp. 179, 190 (C.D.Cal. 1981); *United States v. Lawson*, 502 F.Supp. 158, 172 (D.Mary. 1980); *United States v. Gold*, 470 F.Supp. 1336, 1356 (N.D.Ill. 1979); *United States v. Braniff Airlines*, 428 F.Supp. 578, 583 (W.D.Tex. 1977); *United States v. Gallo*, 394 F.Supp. 310, 312-15 (D.Conn. 1975).

Judicially imposed guidelines for the presentation of evidence to grand juries have been required because of the recognition that the grand jury system, initially conceived as a buffer to protect the accused, has become a "captive" of the prosecutor. According to United States District Judge William J. Campbell, a former prosecutor:

> "Today the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury." Campbell, *Eliminate the Grand*

Jury 64 J.Crim.L.&C. 1974 (1973)

The state of the grand jury's independence was described by former United States Supreme Court Justice William Douglas, in *United States v. Dionisio, supra:*

> "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive. The concession by the Court that the grand jury is no longer in a realistic sense 'a protective bulwark standing solidly behind the ordinary citizen and an overzealous prosecutor' is reason enough to affirm these judgments." 410 U.S. at 23 (Douglas, J., dissenting).

In this Petition William Shaffer requests that this Court recognize and correct certain defects in the grand jury system which allow it to be manipulated by prosecutors. If the grand jury is to continue in its intended role as an institution which protects our citizens, the conduct at issue here cannot be tolerated.

The conduct complained of here is the failure of the prosecutor to inform the grand jury of the true motives of the prosecutor's main witness and to correct the misunderstanding, perhaps amounting to perjury, left by the testimony of Robert Durand. Rather than correct his misrepresentation, the prosecution *allowed* Durand to falsely represent his motives for testifying.

A leading case on grand jury perjury is *United States v. Basurto,* 497 F.2d 781, 785, 786 (9th Cir. 1974). There, the Court of Appeals imposed a burden upon the prosecution to inform the grand jury of *any* perjury committed before it and, further, to inform the court and opposing counsel. *Basurto* was based upon this court's decision in *Mesarosh v. United States,* 352 U.S. 1 (1956). There, the Court held that perjured testimony had "poisoned the water in this

reservoir, and the reservoir cannot be cleansed without first draining it of all impurity;" that perjury tainted the entire proceedings and required reversal. *Mesarosh v. United States, supra,* 352 U.S. at 8; *see United States v. Samango, supra; United States v. Goldman,* 451 F.Supp. 518, 520, 521 (S.D.N.Y. 1978).

The failure of the prosecutor to inform the grand jury here that they had received an "incomplete and inaccurate" picture of the underlying reasons for Robert Durand's testimony not only "condoned" perjury but it also "vouched" for its credibility. This court has long prohibited prosecutors from "vouching" for the credibility of witnesses. *Berger v. United States,* 295 U.S. 78, 88 (1935); *see United States v. Roberts,* 618 F.2d 530, 533, 536 (9th Cir. 1980). The failure of the prosecutor to "speak up" and to produce their evidence questioning Durand's reasons for testifying, allowed the grand jury to conclude that his stated reasons for testifying were true, that he was testifying because it was his duty as a citizen to do so.

This Court has not provided guidelines to be followed in grand jury proceedings. However, it would seem that due process guidelines developed in the trial context should apply *a fortiori* to the grand jury. Moreover, the commentators have imposed a duty of candor on the prosecution during grand jury proceedings. See 8 W. MOORE'S FEDERAL PRACTICE ¶6.03[2], at 6-41 (2d Ed. 1978):

> "If evidence exists, however, which casts serious doubt on the credibility of testimony which the jurors are asked to rely upon in finding an indictment, the prosecutor has an ethical duty to bring it to their attention."

This court has recognized, in the past, that for the grand jury to perform its proper function it must not be controlled by the prosecutor. In *Stirone v. United States,* 361 U.S.

212 (1960), the Court pointed out the importance of an independent grand jury:

> "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. . . .
>
> ". . . the right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away. . . ." 361 U.S. at 218-19.

The issue presented here should be considered in spite of the intervening jury trial and conviction. In other contexts this Court has reviewed alleged grand jury errors, after conviction, and reversed convictions for those errors. In *Cassell v. Texas*, 339 U.S. 282 (1960), the issue was whether an indictment returned by the grand jury which had excluded blacks was valid. Justice Jackson, dissenting, contended that a defendant tried by a fairly chosen jury should not be heard to complain that his indictment was attributed to prejudice. 339 U.S. at 301, 302. The Court, however, found that the issue could be considered and set aside the conviction on the ground that the indictment was not returned by a properly selected grand jury. 339 U.S. at 290. Here, the issue is one of perjured testimony before the grand jury rather than improper selection of jurors. However, as in *Cassell*, the issue is properly before this Court in spite of the intervening conviction and should be resolved. The government's failure to correct perjured testimony of a crucial witness which cast that witness in a false light before the grand jury requires reversal of the judgment here.

Conclusion.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

WEITZMAN and RE,

By HOWARD L. WEITZMAN,

Attorneys for Petitioner.

APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. William W. Shaffer, Appellant. No. 82-1386 CR 81-696(A)-1-DVK.

Filed: June 3, 1983.

Appeal from the United States District Court for the Central District of California David V. Kenyon, District Presiding Argued and submitted April 4, 1983.

BEFORE: GOODWIN, TANG and FLETCHER, Circuit Judges.

Shaffer appeals his convictions on two counts of conspiracy to import and distribute cocaine, two substantive narcotics counts, and four counts of income tax evasion. Shaffer makes five contentions: (1) a preindictment delay violated his due process rights; (2) the indictment should be dismissed because the prosecutor did not fully explore coconspirator Durand's possible motives for testifying before the grand jury; (3) the district court abused its discretion by denying Shaffer's motion to sever the narcotic counts from the tax counts; (4) there was a prejudicial variance between the indictment on the conspiracy counts and the Government's evidence; and (5) the district court abused its discretion in permitting Sepp Donahower and Linda Carradine to testify.

Any preindictment delay did not violate Shaffer's due process rights. Both Shaffer and the Government agree that any delay was due to a continuing investigation; investi-

gative delays do not deprive defendants of due process. *See United States v. Lovasco*, 431 U.S. 783, 795-96 & n.17 (1977); *United States v. Walker*, 601 F.2d 1051, 1056 (9th Cir. 1979).

The district court did not abuse its discretion by denying Shaffer's motion to sever the narcotics counts from the tax counts. Narcotics counts may be joined with tax counts when the defendant failed to pay taxes on income earned from illegal drug dealings. *United States v. Anderson*, 642 F.2d 281, 284 (9th Cir. 1981); *accord, United States v. Davis*, 663 F.2d 824, 831-33 (9th Cir. 1981).

There was no prejudicial variance between the indictment on the conspiracy counts and the Government's evidence. The testimony of Durand provided overwhelming evidence from which a jury rationally could have found a single conspiracy to import cocaine from South America and distribute it in this country. *See United States v. Abushi*, 682 F.2d 1289, 1293-95 (9th Cir. 1982); *United States v. Kenny*, 645 F.2d 1323, 1335 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). The jury was specifically instructed that to convict, it had to agree unanimously on the same conspiracy, with at least one overt act occurring within the limitations period. *Cf. United States v. Echeverry*, 698 F.2d 375, 377-78 (9th Cir. 1983) (conviction reversed where trial judge did not instruct jury upon necessity of unanimous agreement upon the same conspiracy).

Shaffer's contention that the district court erred by allowing Donahower and Carradine to testify despite Shaffer's motion pursuant to Fed. R. Evid. 403 is meritless. Donahower testified that he had arranged a sale of cocaine from Shaffer to another person and that Shaffer had loaned $90,000 to Donahower. Carradine testified that she had purchased cocaine for personal use from Shaffer and that Shaffer had organized a film festival in Telluride, Colorado. Shaffer

contends that this latter testimony, concerning the film festival, was especially prejudicial because it was surprising. Nonetheless, the Advisory Committee's Notes to Fed. R. Evid. 403 explicitly state that surprise is not a ground for exclusion. Furthermore, Donahower's and Carradine's testimony that Shaffer sold cocaine and was dealing with large sums of money tend to prove that Shaffer conspired to import and distribute cocaine. The district court did not abuse its discretion in finding that the probative value of the evidence was not "substantially outweighed" by its prejudice. *See United States v. Regner*, 677 F.2d 754, 756 (9th Cir.), *cert. denied*, 103 S.Ct. 220 (1982); *United States v. Larios*, 640 F.2d 938, 941 (9th Cir. 1981).

Affirmed.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. William M. Shaffer, Appellant. No. 82-1386 CR 81-696(A)-1-DVK.

Filed: July 28, 1983.

Before: GOODWIN, TANG and FLETCHER, Circuit Judges.

The memorandum disposition issued in the above matter on June 3, 1983, is amended as follows:

After the last full paragraph on page 2 and before the word "Affirmed.", insert the following paragraph:

"Finally, we find no prosecutorial misconduct before the grand jury."

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. William W. Shaffer, Appellant. No. 82-1386 CR 81-696(A)-1-DVK.

Filed: August 11, 1983.

BEFORE: GOODWIN, TANG and FLETCHER, Circuit Judges.

The panel voted to amend its memorandum disposition and as amended voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 83-478

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM W. SHAFFER, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his indictment should have been dismissed because the prosecutor did not more fully explore the motive of a co-conspirator for testifying before the grand jury.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to import cocaine, in violation of 21 U.S.C. 963; one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; one count of importing cocaine, in violation of 21 U.S.C. 952 and 960; one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and on two counts of income tax evasion, in violation of 26 U.S.C. 7201. Petitioner was sentenced to concurrent three year terms of imprisonment on the four narcotics charges as well as a three year special parole term on the two substantive narcotics counts. He was also sentenced to five years' probation

on the two tax evasion counts. The court of appeals affirmed in an unpublished opinion (Pet. App. 1-4).

1. Petitioner's convictions arose from his participation with several others in various cocaine importation and distribution ventures. Petitioner's role in the initial partnership was to supply the capital for the cocaine purchases. He furnished funds to Robert Durand, who was to arrange for transportation of the cocaine. Co-defendant Barron Bingen[1] was to provide the name of the source for the cocaine and help petitioner in its distribution. The three were to split the profits equally (Tr. 417-423). Petitioner's successful ventures included the importation of 18 kilograms of cocaine in August 1975 (Tr. 426-434, 438-439); the importation of 18 to 20 kilograms of cocaine in February 1976 (Tr. 444-450, 456-457), and, the importation of approximately 125 kilograms of cocaine paste in June 1976 (Tr. 962-964).

The government's chief witness before the grand jury and at trial was Robert Durand. Durand appeared twice before the grand jury. He testified about the cocaine dealings and his own prior criminal conduct. He further testified that he was prompted to cooperate with the government out of a sense of moral obligation (Tr. 186). Prior to trial, the government disclosed to petitioner a memorandum that Durand's attorney had prepared before Durand approached the government seeking a grant of immunity. The memorandum recounted the attorney's recollection of Durand's motivation for cooperating, including blackmail threats and fear of criminal prosecution. At trial, Durand's motivation for cooperating was fully explored during cross-examination. He denied that he was motivated by any reason other than a desire to find the murderers of three of his friends and a sense of moral obligation to society (Tr.

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[1]Bingen pleaded guilty prior to trial. Co-defendant Joseph Hylan was tried jointly with petitioner; the jury acquitted Hylan (Tr. 1569).

544-571, 586-591, 594-595, 612-618, 683-693, 719-720, 733-738). In addition, challenges to Durand's credibility, particularly his motivation in testifying, were the cornerstones of the summations to the jury on behalf of both defendants (Tr. 1327-1344, 1346, 1391-1393, 1396-1431).

2. Petitioner claims (Pet. 4-8) that the indictment should have been dismissed because the prosecutor failed to inform the grand jury more fully about Durand's motives for cooperating with the government. This claim lacks merit.

Generally, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (footnote omitted). In a limited exception to this rule the Ninth Circuit has held that, in the exercise of its supervisory power, it may be appropriate to dismiss an indictment due to prosecutorial misconduct before a grand jury when, as a result, "the manner in which the prosecution obtained the indictment represent[s] a serious threat to the integrity of the judicial process." *United States* v. *Samango*, 607 F.2d 877, 884-885 (9th Cir. 1979); see, *e.g.*, *United States* v. *Everett*, 692 F.2d 596, 601 (9th Cir. 1982); *United States* v. *Owen*, 580 F.2d 365, 367 (9th Cir. 1978). The sanction of dismissal is reserved, however, for very limited and extreme circumstances. *United States* v. *Thibadeau*, 671 F.2d 75, 77 (2d Cir. 1982).[2] Before

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[2]The post-conviction dismissal of an indictment on grounds of prosecutorial misconduct is an extreme remedy that would not ordinarily serve the ends of justice in particular cases. Where a petit jury has already found the defendant guilty beyond a reasonable doubt, there is little reason to vacate that determination because a prosecutor misstepped in obtaining a similar determination from a grand jury on the basis of the lesser standard of probable cause. The only rationale for dismissing an indictment in such circumstances is to deter future prosecutorial misbehavior. *United States* v. *Thibadeau*, 671 F.2d at 77-78.

that sanction is warranted, prosecutorial misconduct must rise to the level of deception of the grand jury in some significant way, such as the knowing presentation of perjured testimony. *United States* v. *Thompson*, 576 F.2d 784, 786 (9th Cir. 1978); *United States* v. *Kennedy*, 564 F.2d 1329, 1335-1338 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978). There was no such deception of the grand jury in this case.

Durand's substantive testimony regarding petitioner's cocaine dealings was corroborated by documents and interview reports presented to the grand jury (Tr. 187). Furthermore, the allegedly withheld information did not significantly erode Durand's credibility. It showed only that, in addition to being motivated by moral principles, Durand was also motivated by enlightened self-interest—the avoidance of prosecution through a grant of immunity. Nor is there any basis for petitioner's suggestion (Pet. 6) that Durand's testimony was tantamount to perjury. The question of motivation was one uniquely within Durand's personal knowledge. Durand's attorney, quite appropriately, concerned himself with practical concerns, such as avoiding prosecution. But this does not render perjurious Durand's testimony that his motivation, as an individual and not just as a putative defendant, was based on a personal sense of moral obligation.[3]

Petitioner has made no allegation of the type of flagrant misbehavior that might warrant dismissal of the indictment as a means of deterring future misconduct. See *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983) (reversing district court's dismissal of indictment on ground that prosecutor's conduct before the grand jury was inflammatory and prejudicial).

[3]Accordingly, this case differs from *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), on which petitioner relies (Pet. 6-7). In *Basurto*, the key witness admitted that he committed perjury on material issues before the grand jury. Here, there was no perjury at all, much

At most, the grand jury was deprived of a prior inconsistent statement by Durand concerning his motive for cooperating with the government. But such an alleged deficiency in the presentation of evidence to a grand jury does not warrant dismissal of an indictment. *United States* v. *Seifert*, 648 F.2d 557, 564 (9th Cir. 1980). Moreover, the inconsistency, if any, did not relate in any way to Durand's testimony regarding petitioner's cocaine dealings. Rather, it related solely to the issue of Durand's credibility. It is well settled that an indictment may not be dismissed merely for failure to present evidence impeaching the credibility of a grand jury witness.[4] *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983), cert. denied, No. 82-6149 (May 16, 1983); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *United States* v. *Trass*, 644 F.2d 791, 796-797 (9th Cir. 1981); *United States* v. *Thompson*, 576 F.2d 784 (9th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

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less on material facts relating to petitioner's guilt. Even if there were some inconsistency between this case and *Basurto*, it would be a matter for the Ninth Circuit, not this Court, to resolve.

[4]There is no allegation of additional serious misconduct before the grand jury which, combined with failure to make a fair presentation of the credibility of the prosecution witnesses, might warrant dismissal of an indictment. *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979).